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No. 96-1015

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

REVEREND WALTER J. ROBOKOFF, KATHLEEN BATES, STEVEN NATIELLO AND MICHELE STERLACE-ACCORSI,

Petitioners,

vs.

WOMEN'S CHOICE OF BERGEN COUNTY, P.A.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the Order in question since the decision of the New Jersey Superior Court, Appellate Division is consistent with this court's decision in *Madsen v. Women's Health Center,* 114 S. Ct. 2516 (1994), as well as other decisions of this Court?

2. Whether an individually named defendant, who voluntarily intervened in a cause of action for injunctive relief, can claim that he/she should not be enjoined in the same manner as all other persons with notice of the injunction?

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STATEMENT OF JURISDICTION

Respondent submits that this Court does not have jurisdiction to review the Order in question by Writ of Certiorari because neither have the courts of the state of New Jersey decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, nor have they decided an important question of federal law that has not been settled by this Court, or in a way that conflicts with relevant decisions of this Court.

In addition, none of the possible questions presented by the Petitioners bring into question the validity of a treaty or statute of the United States or the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaty or laws of the United States.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Of The Case Below

The Respondent, Women's Choice of Bergen County, P.A. (hereinafter "Women's Choice"), submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners, Reverend Walter J. Robokoff, Kathleen Bates, Steven Natiello and Michele Sterlace-Accorsi. The Petitioners appeal the decision of the New Jersey Supreme Court denying Certification.

The proceedings began on July 13, 1989, when Women's Choice, a private-for-profit corporation engaged in the practice of obstetrics and gynecology, including lawful first trimester abortions, filed a Verified Complaint and Order to Show Cause

against John Doe and Other Unknown and Unidentified Persons and Organizations as a result of intimidating, harassing and disruptive picketing and demonstrating at Respondent's premises, including obstruction of the walkways and entrances to Respondent's facility and harassment and intimidation of Respondent's patients and staff. An Order to Show Cause with temporary restraints was entered returnable July 27, 1989. On August 8, 1989, an Interlocutory Injunction was entered, which, inter alia, restrained and enjoined the Defendants and all persons acting in concert with Defendants from: (1) entering upon the property of the Plaintiff; (2) obstructing vehicular or pedestrian access to the property; (3) disrupting, intimidating or harassing patients and staff of the Plaintiff; (4) making and shouting verbal communications, of the nature of but not limited to "murderers" and "baby killers", and using mechanical amplification equipment for making such communications; (5) picketing or patrolling within an area bounded by the easternmost part of the parking lot serving Plaintiff's building and a point twenty-five feet west of the public sidewalk entrance to Plaintiff's premises.

On November 17, 1989, a Motion to Intervene was filed by Petitioners. On January 4, 1990 an Order was entered permitting the Petitioners to file an Answer. The case then proceeded as a plenary matter. In 1991, prior to trial, protesters at Petitioner's facility began a systematic pattern of conduct, which while adhering to the letter of the Interlocutory Injunction, circumvented its restrictions and undercut its effectiveness. The matter was tried on December 2, 3 and 4, 1991. On February 19, 1992, the trial court issued its opinion and a final Order was entered on March 27, 1992. The final Order, removing all content based restrictions contained in the Interlocutory Injunction and expanded the buffer zone imposed by way of the Interlocutory Injunction. The Order restricted the activities of the defendants to the sidewalk directly across the narrow street from

Respondent's premises. On May 27, 1992, Petitioners filed a Notice of Appeal. On July 1, 1993, the New Jersey Superior Court, Appellate Division affirmed the trial court's Order and on July 20, 1993, Petitioners filed a Notice of Appeal and Notice of Petition for Certification with the New Jersey Supreme Court.

On April 6, 1994, the New Jersey Supreme Court granted the Petition for Certification and summarily remanded the matter to the trial court for reconsideration in light of its decision in the matter of *Horizon Health Center v. Felicissimo,* 135 N.J. 126 (1994). On March 14, 1995, the trial court issued a supplemental opinion which maintained its March 27, 1994, Order in full force and effect. On April 7, 1995, the trial court entered an Order incorporating the provisions of the March 27, 1994 injunction.

On May 17, 1995, Petitioners appealed the trial court's April 7, 1995, Order. The Appellate Division affirmed the trial court's decision, but modified the injunctive order to permit two sidewalk counselors to offer limited, quiet, non-intimidating counseling on the sidewalk within the buffer zone to individuals who do not indicate a desire to be left alone. Following the Appellate Division's decision, Petitioners filed a Petition for Certification with the New Jersey Supreme Court and Respondent filed a Cross Petition for Certification. Both Petitions were denied on September 25, 1996. Petitioner filed the Petition for Writ of Certiorari with this Court on December 23, 1996.

Respondent submits that this Court should not grant the Petition for Writ of Certiorari because the injunction is fully consistent with the principles set forth in *Madsen,* as well as other decisions of this Court and the questions presented by Petitioners have been subject to conclusive determinations by this Court. Moreover, Petitioners have provided no legal basis

to support their contention that they should not be subject to the terms of the injunction, which enjoins them only in the same manner as any other person with notice of the injunction.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI MUST BE DENIED BECAUSE THIS COURT HAS ALREADY ADDRESSED THE ISSUES RAISED BY PETITIONER AND THERE IS NO CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This Court must not exercise judicial discretion by granting the Petition for Writ of Certiorari because the questions presented by Petitioner were directly addressed by this court in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). This Court's decision in *Madsen* makes it clear that a trial court has the authority to impose content neutral injunctive restrictions on the activities of the Petitioners when the restrictions burden no more speech than necessary to serve a significant government interest.

The facts in *Madsen* are strikingly similar to the facts of the within matter. In the case at bar, demonstrators gathered in front of Respondent's clinic, blocking entry to the driveway to Respondent's parking lot, blocking entry to the sole public entrance, trespassing upon Respondent's parking lot, shouting at and accosting Respondent's patients and staff and thrusting literature and plastic model fetuses in patients' faces. The trial record is replete with unrebutted and graphic testimony relating to the effects which the demonstrations had on Respondent's patients and its business. As noted by the trial court,

> There is no question that those actions went far beyond mere speech. The protesters blocked the entrance to plaintiff's clinic. They intimidated plaintiff's patients by confronting them face to face — often only inches apart. They made it difficult and often impossible for them to move freely from their cars to the entrance to plaintiff's building. They did not merely offer information or opinion; they thrust their opinions at their targets orcefully, often physically and obtrusively. The conclusion is inescapable that they did more than seek to persuade. They sought to obstruct plaintiff's operation — and to a considerable extent, they succeeded.

Women's Choice, C-4053-89E (Ch. Div. Feb. 19, 1992) (App. 23, 24).

The trial court also found that while the interlocutory injunction was in place, "[V]iolations became more frequent, and the change of tactics by the protesters — swarming toward prospective patients as they approached the clinic — undercut the effectiveness of the free zone . . ." *Id.* (App. 24) The Court, therefore, entered a final injunction which was broader than the interlocutory injunction and which enabled patients to use Respondent's facility relatively free of confrontation and intimidation, while still allowing the defendants' message to be heard.

In *Madsen,* this Court had an opportunity to review the constitutionality of an injunction entered by a Florida state court which prohibited demonstrations in the area of respondent's health center, at which abortions were performed. This Court held that the creation of a thirty-six (36) foot "buffer zone",

within which demonstrations of any kind, including sidewalk counseling, was prohibited was constitutional. In upholding generally applicable place restrictions, including the buffer zone, the Court recognized that "The need for a complete buffer zone near clinic entrances and driveways may be debatable, but some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties." *Madsen,* 114 S.Ct. at 2527 (1994).

The Petitioners in *Madsen* picketed and demonstrated ". . . where the public street gives access to the clinic." *Madsen,* 114 S. Ct. at 2516 (1994). Accordingly, in September, 1992, a Florida state court enjoined demonstrators from ". . . blocking or interfering with public access to the clinic and from physically abusing persons entering or leaving the clinic." *Id.* at 2518. Six months later, after finding repeated violations of the initial injunction, the state court issued a much broader injunction. This Court held that, "The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order." *Id.* at 2527.

The case at bar is analogous to *Madsen.* The defendants engaged in intimidating and harassing picketing and demonstrating at Respondent's premises, which included obstruction of walkways and access to Respondent's facility. Additionally, the interlocutory injunction was later rendered ineffective as a result of continued aggressive and intimidating conduct of the defendants. Accordingly, the injunctive relief properly enjoins Petitioners. The trial judge put it succinctly. "Given the finding that the 'free zone' is a necessary and proper means to protect plaintiff's rights, there is no reason to conclude that anyone who chooses to do so may interfere with those rights on at least one occasion, before he or she is prohibited from doing so again." *Women's Choice,* C-4053-89E (Ch. Div. March 14, 1995) (App. 44).

In the matter *sub judice,* Petitioners' interpretation of *Madsen,* namely, that the injunction may only enjoin those persons who were found to have interfered with plaintiff's operation of the clinic, is flawed. The New Jersey Appellate Division reviewed the constitutionality of the injunction in question in light of *Madsen* and deferred to the Chancery Division's judgment that, "Clearly, if those restrictions are to be effective in protecting plaintiff's rights, they must be applied to everyone demonstrating at plaintiff's clinic." *Women's Choice,* C-4053-89E at 3 (Ch. Div. March 14, 1995) (App. 42). The named Petitioners are being enjoined no more than any other persons with notice of the injunction. "To say that certain named persons cannot demonstrate within the 'free zone' created by the court's injunction, but others can, would insure that the designed relief would be ineffective." *Id.* (App. 42, 43).

The trial judge further found that, "No case which upholds the creation of a 'free zone', or 'buffer zone', suggests the need to create a two tier system whereby some persons (those not found to have previously violated plaintiffs' rights) may demonstrate within the 'free zone', and others (those found to *have* violated) may not." *Id.* (App 44). Noticeably, Petitioners have not cited one case to support a position to the contrary.

Buffer zones, similar to the one created in the within matter, have been consistently held constitutional. For example, in *Pro-Choice of Western New York v. Schenck,* 67 F.3d 311 (2d Cir. 1995), *cert. granted,* __ U.S. __, 116 S. Ct. 1260 (1996), the Court upheld an injunction prohibiting demonstrations within a fifteen (15) foot buffer zone around an abortion clinic and requiring that sidewalk counselors cease and desist from counseling patients within the zone upon a patient's expression of a desire to be left alone. *See also Fischer v. City of St. Paul,* 894 F. Supp. 1318, 1329 (1995).

Additionally, the subject injunction burdens no more speech than necessary to serve a significant interest. In *Madsen,* this Court addressed Petitioners' contention that the injunction herein, by restricting the speech of parties not involved in the prior picketing and demonstrating, burdens more speech than necessary to serve a significant interest. This Court held that the thirty-six (36)-foot buffer zone around the clinic entrances and driveways burdens no more speech than necessary to accomplish the government interest at stake. *Madsen,* 114 S. Ct. at 2527 (1994).

Moreover, in *Madsen,* the trial court balanced the free speech rights of the demonstrators with respondent's right to provide lawful medical services and the rights of its patients to receive medical treatment and services. This court held that the state's interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy and the state's interest in ensuring the public safety and order, the free flow of traffic on public streets and the property rights of its citizens were significant enough to justify the injunction. *Id.* at 2526.

Likewise, the New Jersey Appellate Division balanced Petitioners' First Amendment free speech rights, including Petitioners' right to voice their anti-abortion message, against the property and privacy rights of Respondent and its patients. The Appellate Division upheld the injunction, albeit in modified form, concluding that the "[T]he injunction complies substantially with the most recent articulation of the Supreme Courts of the United States and New Jersey in this area." *Women's Choice,* A-5102-94T1 (App. Div. April 25, 1996) (App. 57, 58).

Moreover, Petitioner erroneously asserts that the Appellate Division's reasoning fails to measure up to the standard in

Madsen without providing any legal or factual basis for this assertion. Petitioner quotes a selective section of the New Jersey Appellate Division opinion which states, "[I]t would be unfair and unworkable for purposes of the injunction to create two classes of demonstrators, based upon distinguishing those identified as having engaged in the harassing and disruptive conduct from those who were not known to have done so." *Women's Choice,* C-4053-89E (App. Div. April 25, 1996) (App. 57); asserting that Petitioners were enjoined based on this rationale alone. Yet, significantly, Petitioners chose to ignore the full text of the opinion in which the Court engaged in a careful and in-depth analysis of the interests at stake before so holding and rendering judgment.

The New Jersey Appellate Division noted that the present injunction was consistent with New Jersey Court Rule 4:52-4, which states in pertinent part, "Every order granting an injunction and every restraining order . . . is binding only upon such parties to the action and such of their officers, agents, employees, and attorneys, and upon such persons in active concert or participation with them as receive actual notice of the order by personal service or otherwise." The Appellate Division held that it was proper to enjoin the Petitioners because of the ". . . commonality of interest expressed by the named defendants with the John Does initially joined, . . ." *Women's Choice,* A-5102-94T1 (App. Div. April 25, 1996) (App. 57).

As conclusively determined at all levels of the within litigation, the injunction, enjoining Petitioners, burdens no more speech than necessary to serve a significant government interest. Accordingly, the subject Order is fully consistent with this court's decision in *Madsen,* as well as all other relevant decisions of this court.

II.

PETITIONERS CANNOT VOLUNTARILY THRUST THEMSELVES INTO AN EXISTING CAUSE OF ACTION FOR INJUNCTIVE RELIEF AND THEN LATER CLAIM THAT THEY WERE IMPROPERLY ENJOINED.

The trial court allowed Petitioners to intervene in this action pursuant to New Jersey Court Rule 4:33-2, which sets forth, "Upon timely application anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common." At the time Petitioners filed their Motion to Intervene, they were aware that a temporary restraining order had been issued, an interlocutory injunction was in effect and the case was proceeding toward a final hearing. Petitioners knew that Respondent sought injunctive relief and voluntarily intervened; thereby subjecting themselves to the jurisdiction of the Court.

It is well settled that named parties, their officers, agents, servants, employees, attorneys and persons in active concert or participation with them who receive actual notice of a judgment are bound by the injunction or restraining order. 43A C.J.S. *Injunctions* Sec. 251 (1978). Petitioners urge that there must be a showing that each of them individually has violated or imminently will violate some provision of statutory or common law. However, injunctions may extend to persons, "[W]ho though not parties to original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). Furthermore, if the commission of a wrongful act will injure a plaintiff and in order to obtain a remedy at law, it would be required to bring many actions against many persons, plaintiff is entitled to an injunction to prevent the performance of the act, where the rights

of all depend on the same questions of law and fact. 43 C.J.S. *Injunctions* Sec. 29 (1978); *see also Johnson v. Mansfield Hardwood Lumber Co.*, 143 F. Supp. 826, *aff'd*, 242 F.2d 45 (W.D. La. 1956).

As the New Jersey Chancery Division held, and as was later affirmed by the New Jersey Appellate Division,

> No case which upholds the creation of a "free zone," or "buffer zone," suggests the need to create a two tier system whereby some persons (those not found to have previously violated plaintiff's rights) may demonstrate within the "free zone," and others (those found to *have* violated) may not. Given the finding that the "free zone" is a necessary and proper means to protect plaintiffs' rights, there is no reason to conclude that anyone who chooses to do so may interfere with those rights on at least one occasion, before he or she is prohibited from doing so again.

Women's Choice, C-4053-89E (Ch. Div. March 14, 1995) (App. 44).

Moreover, the federal courts have gone farther than the New Jersey courts by affirming the propriety of enjoining unnamed and unknown parties against future conduct prohibited by its order. *See e.g. Portland Feminist Women's Center v. Advocates for Life*, 859 F.2d at 681 (1988); *Northeast Women's Center v. McMonagle*, 745 F. Supp. 1082 (1990). In *Portland*, appellants contended that the injunction, which enjoined right-to-life advocates and all persons, groups and organizations acting in concert with them from shouting, screaming, chanting, or yelling during on-site demonstrations and from producing noise

by any other means which substantially interferes with the provision of medical services within the women's clinic, was overbroad in that "its language reaches individuals and groups not responsible for the disruptive conduct." *Portland,* 859 F.2d at 687. The *Portland* court looked at the reach of the injunction and concluded, "There is no basis for concern that one who is unaware of the injunction can be found in contempt for violating it, nor that it will have a chilling effect on parties neither before the court nor in active cooperation with the advocates." *Id.* at 687.

Similarly, in an abortion clinic's action against abortion protesters based on, inter alia, an interference with contract claim, the court was not required to limit the scope of the injunction only to those individuals that the jury found liable for that claim. *Northeast Women's Center v. McMonagle,* 745 F. Supp. 1082 (1990). The United States District Court for the District of Pennsylvania held, "[E]njoining merely the activities of the named defendants will be wholly insufficient to protect plaintiff and its staff and patients from the continued harassment, assaults and intimidation, which they have regrettably endured and will, inevitably continue to endure unless a more complete injunction is issued." *Id.* at 1094.

The *Portland* and *McMonagle* courts upheld the creation of free zones and recognized the necessity of including unnamed and unknown defendants with notice of the injunction. Thus, in the case at bar, where Petitioners voluntarily intervened in the cause of action, they are properly bound by the terms of the injunction. Exempting Petitioners from the injunction would afford Petitioners special status; status above all other persons with knowledge of the injunction.

CONCLUSION

For all of the foregoing reasons, the Respondent, Women's Choice of Bergen County, P.A., respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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